

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

GSI TECHNOLOGY, INC., ) Case No. 5:13-cv-01081-PSG  
Plaintiff, )  
v. ) **OMNIBUS ORDER RE: PRE-TRIAL  
MOTIONS**  
UNITED MEMORIES, INC., ET AL., )  
Defendants. )  
(Re: Docket Nos. 900, 905, 925, 930, 931)

With zero business days left before trial, Plaintiff GSI Technology, Inc. and Defendants United Memories, Inc. and Integrated Silicon Solution, Inc. have finished briefing four substantive pre-trial motions (and one motion to shorten time).<sup>1</sup> The court rules as follows:

GSI's motion to quash UMI's trial subpoenas<sup>2</sup> is GRANTED.

GSI's motion to have the Hardee document deemed authenticated<sup>3</sup> is GRANTED.

ISSI's motion to strike GSI's newly-added trial exhibits<sup>4</sup> is DENIED.

GSI's motion to strike and exclude the supplemental Cox report<sup>5</sup> is GRANTED.

<sup>1</sup> See Docket Nos. 900, 905, 925, 930, 931.

<sup>2</sup> See Docket No. 900.

<sup>3</sup> See Docket No. 905.

<sup>4</sup> See Docket No. 925

<sup>5</sup> See Docket No. 930

1 GSI's motion to shorten time<sup>6</sup> is DENIED.

2 **A. Docket No. 900: GSI's Motion to Quash Trial Subpoenas to Jeffrey Shohet and Jeffrey**  
3 **Aronson**

4 UMI issued trial subpoenas to Jeffrey Shohet and Jeffrey Aronson, both attorneys at DLA  
5 Piper, GSI's outside counsel.<sup>7</sup> GSI moves to quash both subpoenas.<sup>8</sup> Because UMI has failed to  
6 satisfy the three-factor *Shelton v. Am. Motors Corp.*<sup>9</sup> test, GSI's motion is GRANTED.

7 Under *Shelton*, a party seeking to force opposing counsel to testify at trial must show that  
8 (1) no other means exist to obtain the information; (2) the information is relevant and not  
9 privileged; and (3) the information is crucial to the preparation of the case.<sup>10</sup> Courts in the Ninth  
10 Circuit have held that the *Shelton* factors apply even where, as here, the subpoenaed attorney is not  
11 trial counsel.<sup>11</sup> As to the first factor, UMI seeks trial testimony from Aronson and Shohet about  
12 GSI's representations and positions leading up to the execution of the contract between UMI and  
13 GSI.<sup>12</sup> However, other means of obtaining this information plainly exist, as Robert Gower and  
14 David Chapman, who negotiated the agreement for UMI and GSI respectively, both are on UMI's  
15 trial witness list.<sup>13</sup> Regarding the second factor, UMI seeks communications between Chapman  
16 and Aronson and Shohet, which is plainly information protected by the attorney-client privilege.  
17 Finally, UMI's own conduct shows that the third factor is not satisfied, because the information is  
18 not crucial to the preparation of the case. Despite noticing Shohet's deposition during discovery,

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19<sup>6</sup> See Docket No. 931.

20<sup>7</sup> See Docket No. 900 at 2.

21<sup>8</sup> See *id.*

22<sup>9</sup> 805 F.2d 1323, 1327 (8th Cir. 1986).

23<sup>10</sup> See *id.*

24<sup>11</sup> See, e.g., *Townsend v. Imperial Cnty.*, Case No. 12-CV-2739-WQH PCL, 2014 WL 2090689, at  
25 \*2 (S.D. Cal. May 19, 2014), reconsideration denied, Case No. 12-CV-2739-WQH PCL, 2014 WL  
3734685 (S.D. Cal. July 28, 2014).

26<sup>12</sup> See Docket No. 923 at 2.

27<sup>13</sup> See Docket No. 900 at 4.

1 UMI failed to pursue the matter after GSI objected, and did not depose Shohet. UMI did not seek  
2 to depose Aronson at all.<sup>14</sup> UMI's failure to pursue the depositions of Shohet and Aronson  
3 indicates that their testimony is not crucial to UMI's case.

4 **B. Docket No. 905: GSI's Motion to Authenticate the Hardee Document or Reopen  
5 Hardee's Deposition**

6 GSI moves for a court order authenticating the Hardee document, a copy of the GSI-UMI  
7 agreement marked up by Kim Hardee, currently an ISSI employee and formerly a UMI  
8 employee.<sup>15</sup> GSI alternatively seeks to reopen Hardee's deposition for the purpose of  
9 authenticating the document.<sup>16</sup> Because the court finds that authentication is warranted as a  
10 discovery sanction, GSI's motion is GRANTED.

11 Under Rule 37(b)(2)(A)(i), if a 30(b)(6) witness does not comply with a court order to  
12 provide discovery, the court may issue an order "directing that the matters embraced in the order or  
13 other designated facts be taken as established for purposes of the action, as the prevailing party  
14 claims." Earlier this year, the court ordered ISSI to produce 30(b)(6) witnesses on a number of  
15 topics, including ISSI's contention that it had no knowledge of UMI's work for and relationship  
16 with GSI prior to March 2013; ISSI's discovery of UMI's work for and relationship with GSI  
17 relating to high performance, DRAM, RLDRAM, LLDRAM, and/or Atris; and Hardee's role and  
18 work at ISSI.<sup>17</sup> The court also ordered GSI to send ISSI the specific documents it wanted  
19 addressed during deposition.<sup>18</sup> ISSI designated two 30(b)(6) witnesses to testify on those topics,  
20 and GSI sent ISSI a list of the documents that would be used at those depositions.<sup>19</sup> The Hardee  
21 agreement was on the document list for both 30(b)(6) depositions, but both witnesses testified that

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23 <sup>14</sup> See Docket No. 900-1 at ¶ 4.

24 <sup>15</sup> See Docket No. 905 at 2.

25 <sup>16</sup> See *id.*

26 <sup>17</sup> See Docket No. 600.

27 <sup>18</sup> See *id.*

28 <sup>19</sup> See Docket No. 905 at 3.

1 they had never seen the Hardee document in preparation for their depositions.<sup>20</sup> Because the  
 2 30(b)(6) witnesses were plainly unprepared to testify knowledgeably about the Hardee document in  
 3 violation of the court's order, discovery sanctions under Rule 37(b)(2)(A)(i) are warranted and the  
 4 court orders the Hardee document deemed authenticated. The court further notes that UMI  
 5 reasserts its previously rejected argument that the Hardee document is privileged attorney work  
 6 product and requests that the Hardee document be sealed.<sup>21</sup> Consistent with its earlier order,<sup>22</sup> the  
 7 court DENIES both requests.

8 **C. Docket No. 925: ISSI's Motion to Strike Newly-Identified Exhibits**

9 ISSI moves to strike 18 trial exhibits from GSI's Second Amended Exhibit List,<sup>23</sup> arguing  
 10 that these are "new" exhibits that were not timely identified.<sup>24</sup> However, ISSI's own motion  
 11 concedes that these exhibits are not new, but were "produced by the parties at least six months ago  
 12 during discovery."<sup>25</sup> GSI's failure to identify the exhibits in a timely manner therefore is harmless  
 13 under Rule 37(c)(1).<sup>26</sup> Indeed, nine of the so-called "new" exhibits are on either ISSI or UMI's  
 14 exhibit lists, showing that GSI's late amendment of its exhibit list puts ISSI at no risk of trial by  
 15 ambush.<sup>27</sup> ISSI's motion is DENIED.

16 **D. Docket No. 930: GSI's Motion to Strike and Exclude Supplemental Expert Report of  
 17 Alan Cox and Related Documents**

18 Three days ago, ISSI supplemented the report of its damages expert, Alan Cox, to increase  
 19 the costs that ISSI allegedly incurred in developing the Atris chip.<sup>28</sup> GSI moves to strike the

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20 <sup>20</sup> See *id.* at 3-4.

21 <sup>21</sup> See Docket No. 609; Docket No. 610; Docket No. 915 at 1, 3-4.

22 <sup>22</sup> See Docket No. 610.

23 <sup>23</sup> See Docket No. 919.

24 <sup>24</sup> See Docket No. 925 at 1.

25 <sup>25</sup> *Id.*

26 <sup>26</sup> See, e.g., *Johnson v. Hix Wrecker Service, Inc.*, 528 Fed. App'x 636, 640-41 (7th Cir. 2013).

27 <sup>27</sup> See Docket No. 938 at 2.

28 <sup>28</sup> See Docket No. 928-4 at 2-3.

1 supplemental Cox report as untimely under Rules 26(e)(2) and 37(c)(1).<sup>29</sup>

2 Rule 26(e)(1)(A) permits supplementation of discovery “in a timely manner if the party  
3 learns that in some material respect the disclosure or response is incomplete or incorrect, and if the  
4 additional or corrective information has not otherwise been made known to the other parties during  
5 the discovery process or in writing.” If a supplemental expert report is untimely, however, it must  
6 be excluded under Rule 37(c)(1) unless the failure to timely supplement was “substantially justified  
7 or is harmless.”

8 Here, ISSI’s supplementation of the Cox report is untimely. Rule 26(e)(2) requires that  
9 expert report supplements “be disclosed by the time the party’s pretrial disclosures under Rule  
10 26(a)(3) are due.” The parties’ pretrial disclosures were due on September 22, 2015, per the  
11 court’s standing order,<sup>30</sup> and so the supplemental Cox report, disclosed on October 20, 2015,<sup>31</sup> was  
12 untimely disclosed long after the Rule 26(e)(2) deadline. The failure to timely supplement the Cox  
13 report was neither substantially justified nor harmless; the supplement addresses ISSI’s costs from  
14 January 2015 to June 2015,<sup>32</sup> and while it is understandable that the expense data would not have  
15 been available immediately at the close of business on June 30, ISSI provides no explanation why  
16 it took nearly four months to disclose the underlying cost information and the supplemental  
17 report.<sup>33</sup> The supplemental report significantly increases the cost that ISSI argues should be  
18 deducted from any unjust enrichment awarded to GSI, and at this late date, there is no time for GSI  
19 to respond to Cox’s supplemental report.<sup>34</sup> Because the supplemental report was untimely, and the  
20 untimeliness was neither substantially justified nor harmless, GSI’s motion to strike and exclude is  
21 GRANTED.

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22 <sup>29</sup> See *id.*

23 <sup>30</sup> See *id.* at 5; Standing Order of Magistrate Judge Paul S. Grewal, June 2014, at 2-3.

24 <sup>31</sup> See Docket No. 928-4 at 3.

25 <sup>32</sup> See *id.* at 2-3.

26 <sup>33</sup> See *id.* at 3.

27 <sup>34</sup> See *id.* at 2.

**E. Docket No. 931: GSI's Motion to Shorten Time on Docket No. 930**

Because the parties have fully briefed GSI's motion to strike and exclude the Cox expert report, GSI's motion to shorten time on briefing and hearing that motion is DENIED as moot.

**SO ORDERED.**

Dated: October 23, 2015

Paul S. Grewal  
PAUL S. GREWAL  
United States Magistrate Judge

# United States District Court

For the Northern District of California